IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1423

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,

Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

BRIEF FOR STATES OF ARIZONA AND WISCONSIN AS AMICI CURIAE

ROBERT K. CORBIN
Arizona Attorney General

EDWIN P. LEE
Chief Counsel, Tax Division
114 W. Adams, Suite 600
Phoenix, Arizona 85003
(602) 255-4681

BRONSON C. LaFOLLETTE
Wisconsin Attorney General
114 E. State Capitol
Madison, Wisconsin 53702
(608) 266-1221

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The Attorneys General of the States of Arizona and Wisconsin submit this brief in support of the State of California's position herein pursuant to United States Supreme Court Rule 36.4.

Jurisdiction

Jurisdiction was noted by this Court on October 5, 1980.

Question Presented

May California levy a retaliatory tax in excess of the normal tax against companies domiciled elsewhere, if the state of their domicile taxes insurance companies at a rate higher than does California?

Interest of the Amici Curiae

The States of Arizona and Wisconsin are vitally interested in this matter because the California retaliatory tax at issue here closely resembles a similar tax imposed by both the States of Arizona and Wisconsin.

Appellant, The Western and Southern Life Insurance Company, appeals from a decision of the Court of Appeal of the State of California upholding the California retaliatory tax. If this Court reverses the decision of the California Court of Appeal, the validity of retaliatory taxes will be thrown into question, and Arizona's and Wisconsin's ability to successfully defend challenges in their courts to the constitutionality of retaliatory taxes will be seriously hampered. The California Court of Appeal also upheld the principal office deduction under the California gross premium tax. Neither Arizona nor Wisconsin have a similar provision in their gross premium tax. Therefore, the issue of the principal office deduction will not be discussed in this brief.

The pertinent portions of the Arizona and Wisconsin retaliatory taxes applicable to life insurance companies are virtually identical to the California tax which is before this

Court. The relevant portions of the Arizona and Wisconsin statutes are set forth in full in Appendix "A", *infra*.

Under Arizona Revised Statutes §20-230(A) the Arizona retaliatory tax is imposed upon an out-of-state life insurance company doing business in Arizona if the state of domicile of the out-of-state company would impose higher taxes upon a similar hypothetical Arizona life insurance company doing business in that state. The tax is triggered by higher rates and more inclusive tax bases in other states rather than by discriminatory tax treatment of Arizona insurers doing business in such states. Insofar as the Wisconsin retaliatory tax (Wis. Stat. §§76.35, 76.36) is concerned, the effect and operation of its provisions are, in all material respects, the same as those of California and Arizona.

Finally, while the *amici curiae* firmly believe that this Court should affirm the lower court decision herein, due to the prior good faith reliance by the *amici curiae* states upon and interpretation of various decisions of this Court concerning the constitutional issues herein, it is also respectfully urged that any adverse decision of this Court be declared prospective only in operation.

ARGUMENT

I

The California retaliatory tax is a valid exercise of the State's taxing power and does not violate the Commerce Clause of the United States Constitution

In *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944), this Court held that an insurance company which carried on its business in several states was engaged in interstate commerce and as such was subject to the provisions of the Sherman Act, 15 U.S.C. §§1, *et seq.* Prior to that decision, under the holding in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), the business of insurance had

not been considered to involve interstate commerce. In the absence of federal regulation, the states had developed systems for regulating and taxing the insurance industry.

The reaction among the states and the insurance industry to the *Southeastern Underwriters* decision was profound. Many insurance companies refused to pay state insurance company taxes. *See* 91 Cong. Rec. 478-9, 1087, 1092 (1945). Several states amended or repealed their taxes on insurance companies. *See* G. A. Pelletier, Jr., "Insurance Retaliatory Laws," 39 Notre Dame Lawyer 243, 249 (1964). Congress responded to this situation by enacting the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. §§1011-1015. The McCarran-Ferguson Act's declaration of policy provides in pertinent part:

> "Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." 15 U.S.C.§1011.

The import of this language is clear. Existing state schemes for the regulation and taxation of the insurance industry are not to be construed as violative of the Commerce Clause, Art. 1, Sec. 8, Cl. 3, U.S. Constitution. As interpreted by this Court in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962), the McCarran-Ferguson Act "... provided that the regulation and taxation of insurance should be left to the states, without restriction by reason of the Commerce Clause." State regulation and taxation of the insurance industry are not to be tested under Commerce Clause principles applicable where Congress has remained silent.

Thus, cases such as *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), which held certain provi-

sions of the New York stock transfer tax to be in violation of the Commerce Clause, do not serve as precedent in analyzing the constitutionality of state taxes on the insurance industry. By way of the McCarran-Ferguson Act, Congress has exercised its plenary powers under the Commerce Clause to authorize the states to regulate and tax the insurance industry in ways which might, had Congress remained silent, have been deemed to burden or discriminate against interstate commerce. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 431 (1946).

It is beyond question that Congress can constitutionally exercise its power under the Commerce Clause by authorizing the states to impose burdens on interstate commerce. This Court so held in *Prudential Insurance Co. v. Benjamin*, stating:

> "The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states." 328 U.S. at 434.

This principle was reaffirmed as recently as last term in *Lewis v. BT Investment Managers, Inc.*, __ U.S. __, 100 S.Ct. 2009 (1980). In *Lewis*, this Court held that the

State of Florida could not, consistently with the Commerce Clause, prohibit an out-of-state bank holding company from owning an investment advisory subsidiary doing business in Florida. While Congress can, if it chooses, restrict the flow of interstate commerce, it has not done so in the Bank Holding Company Act, 12 U.S.C. §§1841-1850.

To the contrary, in the McCarran-Ferguson Act, Congress has chosen to restrict the flow of interstate commerce with respect to the business of insurance. This Court so held in *Prudential Insurance Co. v. Benjamin*. At issue in *Benjamin* was the constitutionality of the McCarran-Ferguson Act and the constitutionality of South Carolina's gross premiums tax, which was imposed only upon foreign, and not domestic, insurance companies. After concluding that the McCarran-Ferguson Act was a valid exercise of congressional power under the Commerce Clause, this Court held that the South Carolina insurance premiums tax was among those state taxes which the McCarran-Ferguson Act affirmatively sanctioned.

The tax involved in *Benjamin* was not a retaliatory tax. That fact, however, is immaterial. The South Carolina tax fell only on foreign insurers. It was thus a far more hostile classification than that set up by a retaliatory tax which falls on a foreign insurer only if the insurer's state of domicile imposes higher taxes than those of the retaliating state. In short, *Benjamin* held that the McCarran-Ferguson Act could and did insulate an otherwise discriminatory state insurance tax from challenge under the Commerce Clause.

In two subsequent *per curiam* decisions, this Court reaffirmed its decision in *Prudential Insurance Co. v. Benjamin*. In *Prudential Insurance Co. v. Hobbs*, 328 U.S. 822 (1946), this Court affirmed without written opinion a decision of the Supreme Court of Kansas upholding three aspects of the Kansas insurance tax laws. These included

annual fees imposed upon foreign insurance companies, a premiums tax imposed only on foreign insurance companies, and the Kansas retaliatory tax. *See In re Insurance Tax Cases*, 160 Kan. 300, 161 P.2d 726 (1945). In *Prudential Insurance Co. v. Indiana*, 328 U.S. 823 (1946), this Court again affirmed without written opinion a decision of the Supreme Court of Indiana upholding the Indiana premiums tax which applied only to foreign insurance companies. *See State v. Prudential Insurance Co.*, 224 Ind. 17, 64 N.E.2d 150 (1945). In both of these opinions, this Court cited as controlling authority its prior decision in *Prudential Insurance Co. v. Benjamin*.

Accordingly, in not less than three prior decisions, this Court has upheld state taxes falling exclusively or more heavily on foreign insurers than on domestic companies. No sufficient reason now appears to support the overruling of those precedents. Thus, the McCarran-Ferguson Act, as construed by this Court, insulates the California retaliatory tax from challenge under the Commerce Clause.

II

Classification of foreign insurance companies for purposes of retaliatory taxation is permissible under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In its report on the McCarran-Ferguson Act, the House Committee on the Judiciary noted that state regulation and taxation of the insurance industry remained subject to the commands and prohibitions in the Constitution other than those of the Commerce Clause:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-*

> *eastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as for instance, in *Allgeyer v. Louisiana*, (165 U.S. 578), *St. Louis Cotton Compress Co. v. Arkansas*, (260 U.S. 346), and *Connecticut General Insurance Co. v. Johnson*, (303 U.S. 77), which hold, *inter alia*, that a State does not have the power to tax contracts of insurance or reinsurance entered into outside its jurisdiction...." H. R. Rep. No. 143, 79th Cong., 1st Sess. 2-3 (1945).

All three of the decisions cited in the foregoing committee report are to the effect that a state may not impose its premiums tax on insurance transactions wholly outside its borders. No such issue is presented in the instant case. To the extent there is another constitutional issue relating to the California retaliatory tax, the question is whether or not the tax violates the Equal Protection Clause of the Fourteenth Amendment.

As this Court stated recently in *Parham v. Hughes*, 441 U.S. 347, 351 (1979):

> "State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause. (citation omitted) Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective."

The presumption of validity is particularly strong with respect to state tax laws. This Court in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973), stated:

> "Where taxation is concerned and no specific federal

right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines, which in their judgment, produce reasonable systems of taxation."

The reasons for permitting the states to exercise broad discretion in devising their fiscal policies are plain. Members of a state legislature are necessarily closer to and more familiar with local conditions than this Court. *Madden v. Kentucky*, 309 U.S. 83, 88 (1939). In determining sources of revenue and methods of obtaining it, the states are acting in their sovereign capacities. Moreover, as this Court held in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-528 (1959), a state taxing scheme which treats some taxpayers differently from others is valid under the Equal Protection Clause if "... any state of facts reasonably can be conceived that would sustain it."

Applying these principles, this Court has sustained against equal protection challenges, a state law which denied to the natural father but not the natural mother of an illegitimate child, the right to bring a wrongful death action, *Parham v. Hughes*; a state law which granted a property tax exemption to widows but not widowers, *Kahn v. Shevin*, 416 U.S. 351 (1973); state constitutional provisions which subjected corporations but not individuals to personal property taxes, *Lehnhausen v. Lake Shore Auto Parts Co.*; a state personal property tax which was five times greater on bank deposits held out-of-state than on bank deposits held in-state, *Madden v. Kentucky*; and a state law prohibiting foreign insurance companies but not domestic companies from inserting in their policies a limitation period of less than three years for asserting claims, *Metropolitan Company v. Brownell*, 294 U.S. 580 (1935).

Under these principles, the California retaliatory tax does not deny Appellant the equal protection of the laws. The tax

clearly bears a rational relationship to a permissible state purpose. That purpose is to encourage uniform tax rates on insurance companies throughout the nation. As concluded by the California Court of Appeal in *Atlantic Insurance Co. v. State Board*, 255 Cal. App. 2d 1, 62 Cal. Rptr. 784 (Cal.Ct. App. 1st Dist. 1967), that purpose has to some extent been achieved. Premium taxes on life insurance companies throughout the nation, for the most part, are close to two percent. *See* G. A. Pelletier, Jr., "Insurance Retaliatory Laws," 39 Notre Dame Lawyer 243, 247 (1964). As of 1976, twenty-seven states, including the District of Columbia, had a statutory premium tax rate of two percent; eight states had a statutory rate of three percent or higher, and the rate in the remaining jurisdictions was under two percent. *See* "An Overview of Retaliatory Tax Laws," Subcommittee on State Taxation of the American Council of Life Insurance.

As held by the California Court of Appeal in *Atlantic Insurance Co. v. State Board*:

> "[T]he purpose of the retaliatory law is to secure reciprocity. (citation omitted) It is designed to achieve uniformity of treatment and not to discriminate. In view of the relative uniformity of insurance taxation in the several states, the California law seems reasonably designed to accomplish its purpose. Therefore, we hold that for purposes of this tax, foreign insurers are classified separately on a rational basis and that there was no denial of equal protection." 255 Cal. App. 2d at 15.

Consequently, this is not a case where the difference in treatment was based *solely* on the out-of-state residence status of the taxpayer as was the case in *WHYY, Inc. v.*

Borough of Glassboro, 393 U.S. 117 (1968), relied upon by Appellant.

Finally, this Court in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) stated with respect to the Equal Protection Clause, 337 U.S. at 571-572:

> "After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis."

Since the retaliatory tax is not an ad valorem property tax, cases such as *Wheeling Steel Corp. v. Glander*, also relied upon by Appellant, are inapplicable.

CONCLUSION

Via the McCarran-Ferguson Act, Congress chose to exercise its power under the Commerce Clause by authorizing the states to tax the insurance industry without concern that their taxes may burden or discriminate against interstate commerce. Therefore, California's retaliatory tax does not violate the Commerce Clause. Moreover, the California retaliatory tax does not violate the Equal Protection Clause because it bears a rational relationship to a permissible state purpose and is imposed as a condition of doing business in the state. Therefore, as to the California retaliatory tax, the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

ROBERT K. CORBIN
Arizona Attorney General

EDWIN P. LEE
Chief Counsel, Tax Division
114 W. Adams, Suite 600
Phoenix, Arizona 85003

APPENDIX A

A.R.S. §20-230. *Retaliation*

A. When by or pursuant to the laws of any other state or foreign country any premium or income or other taxes, or any fees, fines, penalties, licenses, deposit requirements or other material obligations, prohibitions or restrictions are imposed upon insurers of this state doing business, or that might seek to do business in such other state or country, or upon the agents of such insurers, which in the aggregate are in excess of such taxes, fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon similar insurers of such other state or foreign country under the statutes of this state, so long as such laws continue in force or are so applied, the same obligations, prohibitions and restrictions of whatever kind shall be imposed upon similar insurers of such other state or foreign country doing business in Arizona. Any tax, license or other obligation imposed by any city, county or other political subdivision of a state or foreign country on insurers of this state or their agents shall be deemed to be imposed by such state or foreign country within the meaning of this section. The provisions of this section shall not apply to ad valorem taxes on real or personal property or to personal income taxes or to assessments on or credits to insurers for the payment of claims of policyholders of insolvent insurers.

B. If an insurer domiciled in this state is refused authority to transact in another state insurance upon a plan and in a manner which is permitted for domestic insurers of such other state, notwithstanding that the insurer of this state is fully qualified for such authority in accordance with the applicable laws of such other state, and if such refusal is not

accompanied by a written statement of the grounds therefor, then and thereafter, and for so long as such refusal shall continue, the director may refuse to grant an initial certificate of authority, but not a renewal of an existing certificate of authority to any insurer domiciled in such other state which may seek to transact in this state a like kind or kinds of insurance.

Wis. Stat. 76.35 *Increase of fee of foreign company*

Whenever the laws of any other state of the United States or of any foreign country, or the rules, regulations, requirements or impositions thereof, or of any department or officer thereof shall require of insurance companies or fraternal benefit societies organized under the laws of this state and doing business in such state or foreign country or of their agents, any deposit of securities for the protection of their policyholders or otherwise, or any payment of taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required by the laws of this state for the same purposes from similar companies or fraternal societies organized under the laws of such other state or foreign country and doing business in this state, or shall impose other obligations, prohibitions or restrictions additional to or in excess of those imposed by the laws of this state upon insurance companies or fraternal benefit societies of such other state or foreign country or their agents, then all such companies or fraternal benefit societies of such other states or foreign country doing business within this state shall make the same depsoit with the state treasurer and shall pay him the same sum for taxes, fines, penalties, certificates of authority, license fees or otherwise, and the same obligations, prohibitions or restrictions of whatever kind shall be imposed upon them and their agents as a condition to the issuance of a license to them, as is required to be made or paid or is imposed upon companies or societies of this state or their agents by the laws of such other

state or foreign country, or the rules, regulations, requirements or impositions thereof, or of any department or officer thereof.

Wis. Stat. 76.36 *Foreign insurance companies; reciprocal taxation*

When any insurance corporation or other insurer of this state shall be licensed to transact insurance in any other state, territory, or district of the United States, like insurance corporations or insurers from such other state, territory or district shall pay no other or greater taxes, fees, or licenses than are or would lawfully be imposed upon and collected from like insurance corporations or insurers of this state by such other state, territory or district; but the amount of such taxes or fees paid by insurance corporations or insurers subject to sections 76.34, 200.13 and 201.59, shall not be less than the amount required and applied as provided in said sections, and the amount of such taxes paid by insurance corporations or insurers under the provisions of subsection (1) of section 76.30 shall not be less than three-eights of one per centum on the amount of the gross premiums received for direct insurance, less the deductions provided in section 76.31, by such corporations or insurers during the preceding year in this state. This section shall not apply to insurance corporations or other insurers of any foreign country.

CERTIFICATE OF SERVICE

EDWIN P. LEE, one of the attorneys for the amici curiae, and a member of the bar of this Court, certifies that he served the attorneys for the Appellant and Appellee in the forgoing case by forwarding two exact copies of the AMICI CURIAE BRIEF in a sealed envelope, first class postage prepaid, and deposited the same in the United States Mail addressed to:

Timothy G. Laddish
Deputy Attorney General
State of California
350 McAllister Street
San Francisco, California
94102

Alan R. Vogeler
2500 Central Trust Center
201 E. Fifth Street
Cincinnati, Ohio 45202

this 18th day of December, 1980.

ROBERT K. CORBIN
Arizona Attorney General

EDWIN P. LEE
Chief Counsel, Tax Division
114 W. Adams, Suite 600
Phoenix, Arizona 85003